

FILING A DEMURRER INCLUDING GROUNDS RELATING TO MERITS CONSTITUTES A GENERAL APPEARANCE

Scott v. Davis

173 Ohio St. 252, 181 N.E.2d 470 (1962)

Plaintiffs brought an action for damages for breach of contract¹ in the common pleas court of Miami County against Davis and The Peters Plumbing Company, an Ohio corporation with its principal place of business in Dayton, Montgomery County, Ohio. Davis was a resident of Miami County, but The Peters Plumbing Company, referred to as defendant, was a resident of Montgomery County and was served with summons there. Defendant filed a demurrer to the petition on the grounds that (1) the petition did not state facts that showed a cause of action against the defendant, (2) the action was not brought within the time limited for the commencement of such action, and (3) there was a misjoinder of parties defendant. The demurrer was overruled and defendant then filed an answer containing a general denial and a restatement of the grounds of the demurrer. Plaintiff subsequently filed an amended petition, and defendant re-filed its answer as an answer to the amended petition. A jury was waived, and the trial was to the court. At the conclusion of the plaintiff's evidence, the trial court dismissed the action as to Davis. Defendant moved for dismissal upon the ground that the dismissal of resident Davis should result in defendant's dismissal due to lack of jurisdiction over its person. This motion was overruled and judgment was rendered against the defendant. On appeal the judgment was affirmed first by the court of appeals and then by the Ohio Supreme Court which held that the filing of a demurrer, which includes grounds relating to the merits of the cause, constitutes a general appearance so as to give the court jurisdiction of the person of a defendant filing such a demurrer.²

Since the petition originally filed in the case did not allege a joint contract, there was misjoinder of defendants, and therefore the venue was improper as to the nonresident defendant. The venue of the action is governed by Ohio Revised Code section 2307.39 which provides:

All actions, other than those mentioned in sections 2307.32 to 2307.38, inclusive, of the Revised Code, must be brought in the county in which a defendant resides or may be summoned. . . .³

The resident defendant Davis was served in Miami County, and therefore the venue was proper to him. Literally, the venue was also proper as to the nonresident defendant, as a defendant was served in Miami County. However, Ohio Revised Code section 2703.04 must also be considered:

¹ Defendant Davis was the general contractor for the construction of plaintiff's house. Defendant Peters (or Peters and Davis) contracted with plaintiff to install a radiant heating system.

² *Scott v. Davis*, 173 Ohio St. 252, 181 N.E.2d 470 (1962).

³ Ohio Rev. Code § 2307.39 (1953).

When the action is rightly brought in any county, according to sections 2307.32 to 2307.40, inclusive, of the Revised Code, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request. . . .⁴

The plaintiff may not abuse the latter section in multiple defendant cases by misjoining defendants. If defendants are misjoined, the action is not "rightly brought" in the county of suit as to a nonresident defendant, and hence this section does not authorize the issuance of a summons to another county. If a summons is actually issued and served on a nonresident defendant in another county, it has been improperly issued and served. It could be argued that this is merely a matter of improper venue as to the nonresident defendant, but if venue is improper, Ohio courts have assumed without discussion that the court lacks jurisdiction of the person of the nonresident defendant. In other words, they usually equate improper venue with lack of jurisdiction over the person of the defendant.⁵ This position of the Ohio courts could be rationalized on the basis that if the issuance of the summons to the other county is not authorized by Ohio Revised Code section 2703.04, the summons is void, and service thereof is insufficient to give the court jurisdiction over the person of the defendant so served. Since the jurisdictional argument is available, a defendant will usually phrase his motion as a challenge to the jurisdiction of the court over his person, rather than as an objection to improper venue. As a result, the word *venue* is seldom used in Ohio practice.

Thus, in the instant case, when summons was served in Montgomery County on the nonresident defendant, two distinct procedural objections were available to it: (1) lack of jurisdiction of the court over its person, and (2) misjoinder of parties defendant.

A defendant who wishes to challenge the jurisdiction of the court over his person must use extreme caution because of the rule that an appearance for any purpose other than to challenge the court's lack of jurisdiction over his person amounts to a general appearance, thus *giving* the court jurisdiction over his person.⁶ In the principal case, the defendant did not limit its appearance. Furthermore, it did not explicitly challenge the jurisdiction of the court over its person, but, instead, filed a demurrer on the three grounds

⁴ Ohio Rev. Code § 2703.04 (1953).

⁵ Wills, "The Effect of Improper Venue Upon Jurisdiction of the Person and Jurisdiction of the Subject Matter," 11 Ohio St. L.J. 291 (1950).

⁶ See, e.g., *Adams v. Hollow Rock Mining & Transportation Co.*, 108 Ohio St. 358, 140 N.E. 624 (1923), demurrer filed on grounds that petition does not state facts sufficient to constitute a cause of action and misjoinder; *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E. 79 (1897), motion filed requiring plaintiff to attach an account of the items of his claim to his petition, or to separately state and number his cause of action, or to strike certain matter from the petition; *Elliott v. Lawhead*, 43 Ohio St. 171, 1 N.E. 577 (1885), motion filed which objected to the jurisdiction of the court over the person and at the same time to the court's jurisdiction over the subject matter.

stated above. The Ohio Supreme Court properly held that by filing this demurrer, the defendant entered a general appearance.⁷

Defendant contended that the ground of the demurrer relating to misjoinder of defendants raised the question of jurisdiction of the person. The opinion of the court assumed that this was so, for the sake of discussion, but held that the inclusion of the other grounds effected a general appearance. The concurring opinion of Taft, J., apparently refused to make this assumption. It seems extremely doubtful that the court would hold that a demurrer on the ground of misjoinder of parties defendant raises the question of jurisdiction over the person of the defendant. If that question should be squarely presented, the court would probably hold instead that a demurrer on the ground of misjoinder of parties defendant is itself a general appearance.⁸

In the principal case, the opinion of the supreme court states that "where such demurrer as to jurisdiction of the person is coupled with an attack on the basis that it does not state a cause of action, such demurrer *relates to the merits* of the cause and constitutes a general entry of appearance." (Emphasis added.) This statement is correct as far as it goes, but it should not be understood as limiting the general appearance to objections relating to the merits. Objections which clearly do not relate to the merits have been held to amount to a general appearance.⁹

The defendant contended that under the rule in *Bucurenciu v. Ramba*,¹⁰ the question of jurisdiction of the person could be raised by a general denial in the answer, but the court properly distinguished that case from the principal case. In *Bucurenciu* the plaintiff brought suit for damages in the court of common pleas of Mahoning County against the defendant Ramba, a resident of Mahoning County, and defendant Cohen, a resident of Cuyahoga County, alleging that they were joint tortfeasors. Venue was laid in Mahoning County under the general venue statute, now Ohio Revised Code section 2307.39.¹¹ Summons was served on Ramba in Mahoning County and on Cohen in Cuyahoga County. Cohen filed an answer consisting of a general denial. The jury returned a verdict against Cohen, the nonresident defendant, and in favor of Ramba, the resident defendant. Thereupon the

⁷ In this respect, there is a sharp contrast between Ohio and federal practice. Fed. R. Civ. P. 12(b) provides that the objection of lack of jurisdiction over the person may be made with other motions, thus eliminating the necessity for a special appearance in federal practice.

⁸ *Adams v. Hollow Rock Mining & Transportation Co.*, *supra* note 6.

⁹ *Long v. Newhouse*, *supra* note 6; *Elliott v. Lawhead*, *supra* note 6.

¹⁰ 117 Ohio St. 546, 159 N.E. 565 (1927). This rule works a hardship on the plaintiff and should have been restricted to situations in which the plaintiff has been guilty of bad faith in joining a resident defendant against whom the plaintiff knows he has no possibility of recovery. Unfortunately, the unqualified rule has become firmly established in Ohio. In automobile cases the plaintiff may avoid the rule by bringing the action in the county in which the injury occurred as provided by Ohio Rev. Code § 4515.01 (1953).

¹¹ Ohio Rev. Code § 2307.39 (1953).

court sustained Cohen's motion to dismiss for want of jurisdiction of his person, and the supreme court affirmed, holding that when jurisdiction of the person of the nonresident defendant appears only by allegation of the petition, a general denial filed by such defendant challenges such jurisdiction and the defendant may at the same time and throughout the trial question both the jurisdiction of the person and the merits of the cause. Therefore, the question of jurisdiction of the person can be raised in the answer although the issue concerns both the merits and jurisdiction of the person. However, this can be done only when the answer is the first opportunity to raise such issue, *i.e.*, when the defect does not appear upon the face of the petition.¹² This is the only instance where a valid attack upon jurisdiction of the person can be united with an attack upon the merits of the cause. In the principal case, in contrast to the *Bucurenciu* case, the defect appeared on the face of the petition as no joint contract was alleged in the original petition.

There are two ways in which the defendant in the principal case could have effectively attacked the jurisdiction of the court over its person. First, since the petition revealed that no joint contract was alleged, the defendant could have successfully moved to quash the summons. This was done in a similar situation in *Canton Provision Co. v. Gauder*.¹³ In order to give the court jurisdiction over the nonresident defendant, the averments of the petition must show that the plaintiff has a valid cause of action against the resident defendant as well as against the nonresident defendant, and must also show that the defendants are properly joined.¹⁴ Secondly, according to the opinion in the principal case, the defendant could have demurred solely under Ohio Revised Code section 2309.08(A).¹⁵ Such a demurrer directed to the court's lack of jurisdiction over its person should have been sustained as the defect appeared on the face of the petition. Even if defendant had asserted this ground explicitly, it could not with safety combine with it any other ground of demurrer, as this would probably result in the entry of a general appearance. If a defendant employs a demurrer on ground (A) to challenge the court's jurisdiction over his person, he presumably must forego other possible grounds of demurrer. Thus, it would seem that a motion to quash is ordinarily preferable to a demurrer on ground (A).

If a nonresident defendant is not sure whether a petition alleges joint liability (either in contract or in tort), he should first move to quash the summons on the assumption that the misjoinder is apparent on the face of the petition. If this motion is overruled, the defendant should then file an answer containing a general denial as in the *Bucurenciu* case. The nonresident

¹² Ohio Rev. Code § 2309.10 (1953): "When, on the face of a petition, no ground of demurrer appears, the objection may be taken by answer. . . ."

¹³ 130 Ohio St. 43, 196 N.E. 634 (1935).

¹⁴ *Gorey v. Black*, 100 Ohio St. 73, 125 N.E. 126 (1919).

¹⁵ Ohio Rev. Code § 2309.08(A) (1953): "The defendant may demur to the petition only when it appears on its face that: (A) The court has not [no] jurisdiction of the person of the defendant."

defendant could then have the action dismissed as to him if it is established at the trial that joint liability does not exist. If defendant's motion to dismiss at the trial is overruled and judgment is entered against him, an appellate court may reverse either (1) for error in overruling the motion to quash if it holds that joint liability was not alleged on the face of the petition, or (2) for error in overruling the motion to dismiss at the trial if it rules that joint liability was alleged on the face of the petition, but was not established at the trial. The action in the *Bucurenciu* case was in tort, but it should make no difference in principle whether the action is in tort or contract. The principal case is apparently the first to recognize the possibility of the application of the *Bucurenciu* doctrine to actions in contract. The procedure suggested above should preserve to a nonresident defendant the defense of no jurisdiction over his person, whether or not the appellate court holds that the misjoinder appeared on the face of the petition.

In its appeal in the instant case, the defendant did not make any assignment of error with respect to the misjoinder of defendants. It seems clear from the opinion of the supreme court that error was committed by the trial court in overruling defendant's demurrer on the ground of misjoinder of defendants. However, the fact that the plaintiff filed an amended petition possibly made this error unavailable to the defendant. Although defendant asserted misjoinder of defendants in its answer to the amended petition, there was apparently no attempt by the defendant to rely on the defense of misjoinder (as such) at the trial. There does not appear to be any clearly defined procedure in Ohio by which defendant could have relied upon this defense at the trial after the resident defendant was dismissed. Clearly a motion to elect (the usual procedure¹⁶) would have been inappropriate, when only one defendant remained. Thus a nonresident defendant should direct his efforts toward properly raising and preserving a defense of no jurisdiction over his person, as it may be impossible to utilize the defense of misjoinder of defendants, whether or not that defense appears on the face of plaintiff's petition.

¹⁶ *French v. The Central Construction Co.*, 76 Ohio St. 509, 81 N.E. 751 (1907). In tort actions against master and servant, when the misjoinder does not appear on the face of the petition but is disclosed by the evidence, the Ohio courts will sustain a motion by the defendant to require the plaintiff to elect between the defendants.